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No. 00-195

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH AND MARIA RIGA,

Petitioners

v.

RONALD AND FAYE ALEXANDER and FAIR HOUSING PARTNERSHIP OF GREATER PITTSBURGH, INC.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a fair housing organization which proved diversion of its resources for investigating a complaint of race discrimination in housing has standing to sue for damages caused by the violations of the Fair Housing Act which its investigation revealed.

2. Whether landlords who violated the Fair Housing Act are liable to the aggrieved parties whose rights were violated by their conduct

3. Whether punitive damages can be awarded for violations of the Fair Housing Act where the jury failed to award actual damages.

4. Whether a principal with a non-delegable duty not to discriminate is vicariously liable for punitive damages for housing discrimination committed by his managerial agent

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COUNTERSTATEMENT OF THE CASE

Petitioners unfairly characterize themselves in their Petition before this Court as a 'mom and pop' Italian-American couple who own 'an' apartment building in Pittsburgh, Pa. *Petitioners' Brief* at 3. In fact, Joseph and Maria Riga (hereinafter, 'landlord-Husband' and 'Landlord-Wife') own and operate six multi-unit apartment buildings in Pittsburgh, Pa. *App. D at 59 a.* Mrs. Riga admitted that that she served as managerial agent doing all tenant applications, check cashing, bill payment and dealing with tenants, while her husband was in Italy. Landlord Wife advertised in the Sunday September 17, 1995 newspaper an apartment for rent in one of their buildings, 5839 Darlington Rd., located in a predominantly white, wealthy area of Pittsburgh. On that same day, Ron and Faye Alexander, an African-American couple, telephoned the Rigas' unlisted number stated in the ad and set up an appointment with Maria for the Alexanders to view the apartment . The Alexanders telephoned Maria and changed the time of their appointment. At the appointment on Monday 9/18, Mrs. Riga saw the Alexanders waiting for her, realized they were black , and falsely advised the Alexanders 'they had just missed ' the apartment. This apartment remained empty and not rented, and was advertised weekly by the Rigas, from September 17 until November 20, 1995. *App.D. at 67a.*

The next Sunday 9/25/95, the same ad appeared again. Seeing the same advertisement Mr. Alexander asked a white friend, Robin McDonough to call about it. Robin reported to the Alexanders that she was told that the apartment was available. Mrs. Alexander then called again, identifying herself as Stacy, and was asked by Maria where she was then living. Faye replied 'Homewood', a predominantly poor and black area of Pittsburgh; Faye was falsely told by Maria the apartment was not available. After consulting with a lawyer, Caroline Mitchell, Mr. Alexander complained about the way he and his wife had been treated to the Fair Housing Partnership of Pittsburgh (hereinafter 'FHP'.) Attorney Mitchell hired a private white detective Jeff Lang, to investigate.

Using a different name, Mr. Alexander telephoned to see the apartment, received an appointment from Maria for 9/30, and called Maria twice the morning of 9/30 to confirm his appointment. When he met Maria at the building, she falsely stated that she had forgotten her keys, and could not show him the apartment, as her hand covered up her keys. Mr. Alexander "couldn't believe it, it made him angry," he thought she was lying. When he asked to reschedule, Mrs. Riga refused to reschedule and said that he could call her. He was feeling "a little bit too sick to say anything else . . . . He walked away, then turned and saw her entering the building.." At trial, the Alexanders described in detail the deceptions to which they were subjected, and the consequent mortification they suffered. Mr. Alexander continued to try to contact Mrs. Riga after the 'key' incident, and also had friends call. He testified at trial that he felt "hurt and discouraged, it is sort of degrading, it discourages you from trying . . . to find a place for your family to live, it is just sickening, I really can't describe it. It is terrible . . ."

After filing a complaint with FHP , Ron Alexander called the Riga number, leaving numerous messages from 9/30 through 10/8 to reschedule, but did not receive any responding telephone call from Mrs. Riga. When he did 'catch ' Maria personally answering the phone, she refused to deal with him, falsely telling him ' the unit has been rented' 'the ad was placed prematurely, the old tenant had n't moved yet'; ' 'the apartment is not available.' From September 17, 1995, through October 8, 1995, on ten separate occasions, Ronald and Faye Alexander, inquired about availability of the apartment and were lied to by Maria Riga. During the same time, whites had their calls returned, were truthfully told the apartment was available, and were granted a view.

Ron Alexander complained about Mrs. Riga's behavior to Fair Housing Partnership of Pittsburgh, a fair housing organization funded by the Federal government whose mission and purpose is to investigate complaints of housing discrimination. To investigate the Alexanders' complaint, FHP staff ' dropped everything else ' to set up a tester program for 5839 Darlington. FHP staff was concerned because the Riga's refusal to deal with blacks in

Squirrel Hill exacerbated the segregation that already existed in Allegheny County. *r.* 232. FHP staff prepared, structured and monitored the tests, and found and assigned black tester Daria Mitchell and white tester , Dennis Orvosh. Daria Mitchell, an African-American "tester" for the FHP, telephoned Maria for an appointment and was deliberately given a nonexistent and incorrect address ('583' Darlington Rd. instead of '5389') by Maria , who also falsely identified herself as 'Maria Ianotti ' to Daria. As Daria walked up to the building, Maria Riga and Jeff Lang (the white detective hired by counsel for the Alexanders) had just finished viewing the apartment. As Maria saw Daria, she told Jeff that ' this woman (Daria) is driving me up a wall' as she rolled her eyes . Daria was then falsely told by Maria , in front of Jeff, that ' Jeff was getting the apartment .' Maria Riga never replied to Daria Mitchell's request to call Daria if the apartment became available.

From Sept. 30 through Oct. 4, FHP then structured tests, assigned testers, and monitored additional tests to see if whites were still being told the truth about apartment availability while blacks Daria Mitchell and Ron Alexander did not even get return phone calls. FHP's investigation disclosed that beginning September 18 1995, on ten separate occasions, Mrs. Riga returned phone calls to whites, and truthfully told whites that the apartment was available, allowed each white a view, and promptly returned whites' phone calls. As of Nov. 20, 1995, Maria had never replied to the requests of Daria Mitchell or Ron Alexander. (In their petition, Respondents unfairly characterize this testing and investigation by FHP as FHP's 'minimal and gratuitous..' involvement.)

The inability of blacks to rent in Squirrel Hill was of concern to FHP. FHP believed that because the segregation was in Squirrel Hill, a predominantly white area, an unchecked act of discrimination had a strong negative impact. To counter the Riga's discrimination, and as a result of the Alexanders' Complaint, FHP diverted staff resources and funding from other projects to investigate the complaint, then undertook activities of education and outreach to counter the effects of the Rigas' discrimination.

FHP joined Ron and Faye Alexander as plaintiffs in suing the Rigas for race discrimination for Landlords' violations of their rights to truthful information as guaranteed by the Fair Housing Act , 42 USC 3604(d). Contrary to Respondents' description of the relief sought, all Plaintiffs sought compensatory, nominal and punitive damages , declaratory, equitable and injunctive relief, and presented evidence in support of damages at trial. In defense of the claims, Mr. Riga claimed he was in Italy, and Mrs. Riga variously claimed that she had never met, seen or spoken to the Alexanders, that her answer machine was broken, that she received no messages from the Alexanders, that Apartment #2 was not vacant or available for rent , that the tenant had not moved yet and that the apartment had been advertised 'prematurely.'

A jury found in favor of each Plaintiff, returning special verdicts that Maria Riga had discriminated and had violated the Fair Housing Act. *App. B at 33a.* Because Landlord-Wife conceded that she was managerial agent for her co-principal, her husband, the discriminatory acts of the agent were imputed to the principal and the jury was charged with determining only whether Maria Riga as agent had discriminated and violated the Fair Housing Act. If so, Joseph as principal was liable by law for the discriminatory acts of his agent . The learned trial court committed plain error in the jury instructions, when it instructed the jury that it must find ' legal harm' as prerequisite to an award of compensatory or nominal damages. The jury found no 'legal harm' to the Alexanders, and awarded zero damages to each, despite testimony that both Alexanders were embarrassed and humiliated and that the services of the private detective had cost $450.00.

The jury found ' legal harm' to FHP, but awarded no damages despite FHP's testimony of $2250 in expenses incurred in investigating the Alexanders' complaint, *App. at 76a* . The trial court refused to send punitive damages to the jury, because no award of compensatory damages had been made for any plaintiff. *App. B at 41 a.* The trial court entered judgment for Landlords as prevailing parties against all Plaintiffs then reversed its entry of judgment for Landlords against FHP. *App. B at 45a-46-a.* The

trial court refused to tax costs for plaintiff FHP , or for Defendants against Plaintiffs, *App. B at 51a-52a,* reasoning that each party should bear its own costs, and that 'there should be some consequence to the Rigas for such conduct. ' The result of the trial was thus that all Plaintiffs spent their own funds and were out of pocket for proving Landlords had committed violations of the Fair Housing Act in refusing to deal with Afro-Americans at their Darlington apartment.

On appeal, the court of appeals affirmed the standing of FHP to sue , *App. A at 11a,* and found that once the jury found discrimination, it was plain error for the District court to require Plaintiffs to also prove ' 'legal causation and harm ' to be entitled to compensatory damages. *App. A at 13a, 14a.* The Court of Appeals also found that the jury was erroneously instructed that an award of nominal damages requires a finding of 'insubstantial actual damages or ' legal harm. '

A plaintiff need not prove that a violation of the Fair Housing Act caused 'legal harm or actual injury.' *App. A 14 a* . The Court of Appeals reversed the entry of judgment for the Landlords against the Alexanders, assigned judgment for the Alexanders, declared the Alexanders and FHP to be prevailing parties against Landlords, and remanded for assessment of attorney fees and costs against Landlords and a new trial on punitive damages against both Landlord Husband and Landlord Wife . A principal (Joseph Riga) who has violated his non delegable duty not to discriminate by acts of his managerial agent is liable for punitive damages under *Restatement Second Agency 217 C(c) . App A at. 30a.*

REASONS FOR NOT GRANTING THE WRIT

I.

Courts of Appeal Have Correctly Applied Precedent to Hold that A Fair Housing Organization Which Proved Diversion Of Its Resources For Investigating A *Bona Fide* Complaint of Race Discrimination In Housing Has Standing To Sue For Violations Of The Fair Housing Act under *Havens Realty v. Coleman*

The Court of Appeals properly applied *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed. 2d. 214 (1982), to uphold the trial court's decision that FHP had standing to sue as an aggrieved person who suffered damages by its diversion of resources to investigate a complaint, and action to counter the Landlords' discriminatory acts. *App A at 7a.* In their *Brief* at p. 6, Petitioners misstate the record below by stating that the only basis for FHP's suit is the ' litigation expense' incurred by FHP. Petitioners further mislead this Court by claiming that the court below erroneously ' held that merely incurring litigation expense' confers standing.

FHP sought damages flowing from Landlords' violations of the Fair Housing Act which FHP's investigation revealed. 'Litigation expense' alone was never sought by FHP; the record discloses FHP's spending money for investigation of the Alexanders' complaint and FHP staff's 'dropping everything else' and diverting time and money from other projects to formulate, prepare, assign and conduct tests to see if Landlords were refusing to deal with black applicants at Darlington. Finding discrimination, FHP then countered the effects of the Rigas' discrimination by education and outreach, diverting more money and staff time from its other programs. FHP based its standing to sue on its status as an aggrieved person statutorily entitled to sue to redress Landlords' violations of the law and its incurring damages of expenses for its investigation and outreach caused by Landlords' violations. *App. D, at 75 a-76a.*

In an effort to obtain certiorari, Petitioners not only misstate the record on 'litigation expense' but also mischaracterize the Court of Appeals decision on standing as 'undermining' *Havens*. *Havens* involved a fair housing organization who assigned two testers to investigate a *bona fide* complaint that Havens was lying to blacks about apartment availability in violation of 3604(d). *Havens* established the rights of the organization to sue based upon deprivation of statutory rights guaranteed by the Fair Housing Act, because invasion of those rights constitutes an injury . Damages to a fair housing organization may include damages for diversion of its resources and impairment of its mission. *Havens, Id.* at 372.

Petitioners argued to the Third Circuit that its panel decision in *Fair Housing Council of Greater Philadelphia v. Montgomery Newspapers* , 141 F. 3d 71 (3rd Cir. 1998) 'has created confusion within the Circuit...' *Brief at 8.* However, the court of appeals unanimously rejected Landlords' contention that frustration of mission and/or diversion of resources to investigation are each insufficient to confer standing. In *Fair Housing Council,* The Third Circuit cited to *Havens* stating, "*Havens* made clear that where discriminatory practices have perceptibly impaired an organization's ability to carry out its mission, there can be no question that the organization has suffered an injury in fact." The court then noted that FHC's claim based on diversion of resources to investigation 'fails for lack of proof.' ".... Thus, in both *Alexander* and *FHC* , the Third Circuit correctly ruled that diversion of resources to investigation can constitute injury in fact. The 'confusion in the third Circuit' claimed by Landlords simply does not exist .

Petitioners also seek certiorari, and cite a number of court of appeals decisions applying the established principles of *Havens* to the complicated factual records in these cases. The mere fact that lower courts applying *Havens* come to different results as to organizational standing is not *per se* evidence of a 'split in the circuits.' In *Spann v. Colonial Village,* 283 U.S.App.D.C. 216 899 F.2d 24 (D.C. Cir. 1990) the Court found that 'the fact that the alleged harm affects the organization's non-economic interest - for example, its interest in encouraging open housing-- does not deprive the organization of standing ' and that the organizations allege such injury here: 'resources devoted to checking the ads and then neutralizing the ads' adverse impact on buyers and renters ...'

The Petitioner's *Brief* mis-cites the holding in *Village of Bellwood v. Dwivedi,* 895 F. 2d 1521 (7th Cir. 1990). The holding in that case was <u>not</u> that a mere 'deflection of time and money from counseling to legal efforts is sufficient injury to confer standing.' Rather the Seventh Circuit held that the organization's efforts to investigate steering were sufficient injury in fact to confer standing. *Hookers v. Weathers* , 990 F. 2d 913 (6th Cir.

1993) did not hold that a mere 'deflection of time and money from counseling to legal efforts alone is sufficient injury to confer standing.' Rather, the appeals court reversed the trial court's margin order, noting , "From the meager record before us we see no evidence that plaintiffs lack standing.'

Last, petitioners cite *Louisiana Acorn Fair Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000) as evidence of a 'split.' There, $10,000 in punitive damages were awarded to the individual plaintiff denied an apartment because of race. The Court of Appeals vacated the punitive damages award, noting that under state law, punitive damages are prohibited when there is no compensatory damages award. The appeals court vacated the compensatory damages awarded to ACORN for its expenses of investigating the complaint of discrimination and noted that an ' organization can have standing if it has proven a drain on its resources', but ruled that ACORN did not prove 'drain on its resources' and thus had no standing to sue.

Respondents contend that ACORN was wrongly decided by the Fifth Circuit's failure to properly apply the *Havens* standard of diversion of resources to the facts of the case. The Fifith Circuit's coming to a different result as to ACORN's standing, on different facts, does not mandate a grant of certiorari in *Alexander*.

As further proof of a split, Petitioners cite to an inapposite Title VII case, *Fair Employment Council of Greater Washington v. BMC Marketing 28 F. 3d 1268* (D. C. Cir. 1994) (fair employment organization has no standing to sue under 42 USC 1981 and Title VII for its sua sponte 'self-referred' investigation of racially motivated refusals to hire.) Petitioners fail to point out to this Court that the appeals court noted "...neither of the federal (employment) statutes that (plaintiffs) invoke give tester plaintiffs a cause of action for damages, and they lack standing to seek other forms of relief in this case..."

II.

The Third Circuit's Decision Properly Recognizes that Landlords' Statutory Violations of the Fair Housing Act renders Landlords Liable for Damages Caused by the Violations of Plaintiffs' Rights

Racial discrimination is a "fundamental injury to the individual rights of a person," *Goodman v. Lukens Steel*, 482 U.S. 656, 661, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987), and the inability to buy or lease real property can be considered one of the badges and incidents of slavery. See *The Civil Rights Cases*, 109 U.S. 3, 22-23, 27 L. Ed. 835, 3 S. Ct. 18 (1883) The complaints filed by respondents Alexander and FHP are statutory forms of action alleging statutory violations. The Fair Housing Act provides that "an aggrieved person may commence a civil action... to obtain appropriate relief with respect to such discriminatory housing practice or breach." 42 U.S.C. @ 3613(a)(1)(a).The Fair Housing Act defines "discriminatory housing practice," 42 U.S.C. @ 3604, as follows:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

The plain language of the Fair Housing Act thus permits an 'aggrieved person' to obtain damages and relief for the discriminatory housing practice or breach. Such person must prove only that a landlord did one of the unlawful acts listed in section 3604 , then prove the damages suffered. *Dobbs on Remedies* , Sec. 3.11 at 279 notes, '...Damages means harm or loss suffered by a Plaintiff. The harm may be more or less than the damages awarded ...' "...Substantial damages may be permitted in dignitary torts such as batteries .. or for denial of important rights like the right to vote ...' *Dobbs*, Sec. 7.4.

The Third Circuit held that proof of a violation of the Fair Housing Act is sufficient to impose liability on the landlord-petitioners for whatever damages were caused to each Plaintiff. Absent a plaintiff's proof of 'actual injury' , nominal damages are mandatory to recognize a violation of a civil right. The jury found that Landlords violated Plaintiffs' federal rights to be free from housing discrimination. This entitles each Plaintiff to be awarded such actual damages as are proven, and punitive damages.

Petitioners misapprehend what the Court of Appeals opinion says in *Alexander , App. A at 12a.* The court merely states that a statutory violation of the Fair Housing Act is a 'harm' which renders Landlord liable for damages caused thereby . A Plaintiff who proves a violation of the Fair Housing Act need not then also prove 'legal harm: ' he or she need only prove that the statute was violated, and then prove what damages were caused thereby. In so ruling, the Court of Appeals was faithful to its own precedent in *Basista v. Weir*, 340 F. 2d 74, 87 (allowing punitive damages without actual damages for false arrest in violation of 42 USC 1983, rejecting a state-law tort requirement that Plaintiff prove ' actual harm' or actual injury before being entitled to punitive damages)

Petitioners erroneously imply that *Alexander* is inconsistent with *Carey v. Piphus* , 435 U. S. 247, 266-267 (1978). The *Carey* Court held that nominal damages could be awarded to recognize violation of the right to due process, without proof of actual injury, because the right to procedural due process is absolute . . . "Under the Fair Housing Act, the right to fair housing opportunity is absolute. If Plaintiff proves that Defendant violates the Fair Housing Act, the aggrieved persons is entitled to recover the damages which are proved to be caused . Such a result is completely consistent with the Supreme Court's analysis in *Carey.*

Petitioners then call the Court's attention to a string of old and new Title VII cases such as *McDonnell Douglas v. Green* , 411 U.S.792 (1973) through *Reeves v. Sanderson Plumbing Products* , Inc. 120 S.Ct. 2097 (2000) and claim without further explanation that *Alexander* 'contradicts all of these decisions of this Court ... ' *Brief* at 12.

Petitioners then claim that *Alexander* 'severs the causation link' in discrimination cases , resulting in 'unprecedented expansion of liability' . *Brief* p. 17

This excoriation of the third Circuit's opinion is perplexing and uncalled for. Upon proof of a violation of Title VII, Plaintiff adduces proof that Employer's discrimination caused Plaintiff some damages such as lost promotion , back pay or emotional distress . The recent 1991 amendments to title VII , 42 USC 1981a (1991) create a claim for compensatory and punitive damages for violation of Title VII , and render Employer liable for violation of the law even if Employer proves it would have made the ' same decision' . Under either Title VII or Title VIII, proof is is the same: once Plaintiff proves that a Defendant commits unlawful discrimination in violation of the statute, Plaintiff proves what damages are 'caused by' the discriminatory act and what redress is appropriate. The *Alexander* Court held that it is plain error to require a Title VIII plaintiff to prove ' legal harm' or 'insubstantial actual injury' before being entitled to compensatory or nominal damages.

In a last effort to show a 'split within the Circuits,' the defendants cite an inapposite Title VII case, *Walker v. Anderson Elec. Connectors,* 944 F. 2d 841 (11th Cir. 1991) a Title VII sexual harassment case arising prior to the 1991 amendments . In *Walker,* under then-existing law, a plaintiff subject to sexual harassment had no entitlement to compensatory or punitive damages . Walker failed to prove any back pay loss 'caused' by Employer's discrimination. *Walker* merely stands for the proposition that where Walker failed to request nominal damages at trial, failed to prove actual damages, and failed to file post trial motions claiming a entitlement to nominal relief, Plaintiff had waived claims for nominal relief, and was not entitled to a verdict.

III.

Punitive Damages Can Be Awarded for Violations of Federal Civil Rights Absent an Award of Actual Damages

Petitioners challenge the decision of the Third Circuit Court of Appeals remanding for a new trial on

punitive damages. This matter is not ripe for issuance of a writ of certiorari to the Third Circuit until after the trial on punitive damages. Should Landlords prevail and defeat punitive damages , the punitive damages question in this case will be moot.

The decision of the Third Circuit Court of Appeals remanding for a new trial on punitive damages properly relies upon the legislative history and the plain language of the Civil Rights Act of 1968, 42 USC 3601 et seq. Plain language of the damages provision of the Fair Housing Act. 42 U.S.C. @ 3613(c) is as follows:

> (1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred . . . , the court may award to the plaintiff actual and punitive damages, and . . . may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

A Court has the duty to "give effect, if possible, to every clause and word of [the] statute. . . . " *Bennett v. Spear*, 520 U.S. 154, 173, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). An award of punitive damages is not conditioned upon an award of actual damages under the plain language of this statute, and the third Circuit so found.

Petitioners cite two circuit opinions, the 5th Circuit's *Louisiana ACORN , supra* at 8, and the 4th Circuit's *People Helpers Foundation v. City of Richmond* , 12 F. 3d 1321, 1327 (4th Cir. 1993) Both courts set aside punitive damage awards under title VIII because no compensatory damages were awarded. The court in *Louisiana ACORN* concluded that punitive damages were not available for mere 'statutory violations ' of Title VIII civil rights. *People Helpers* refused to allow punitive damages for a Title VIII civil rights violation , noting that Virginia state law precluded an award of punitive damages without actual damages. The *ACORN* panel rejected the logic of *Peoples Helpers*, noting that the basis

for its holding is 'flawed.' Quoting the 'flawed logic' rejected by ACORN, Petitioners now argue that state law controls entitlement to punitive damages for federal civil rights violations.

Petitioners unfairly accuse the Third Circuit ' without explanation' of finding that punitive damages can be awarded without compensatory damages, and then omit all mention of the Court's discussion at *App. A, at 18a* of *Basista v. Weir,* 340 F.2d 74 (3rd Cir. 1965) (upholding award of punitive damages for violation of due process rights under 42 U.S.C. 1983 without any award of compensatory damages.)

Petitioners argued in their Brief to the 3rd Circuit that punitive damages can never be awarded at all, absent compensatory damages, for any federal civil rights violations whatsoever. *App A at 18a.* But Petitioners then conceded before the 3rd Circuit that under *Basista* it is appropriate to award punitive damages without compensatory damages for 'constitutional' violations under 42 USC 1983. ACORN applied 5th Circuit precedent to hold that punitive damages are unavailable for mere 'statutory' violations of Title VIII. That holding, while erroneous, does not provide grounds for granting a writ of certiorari in this case.

IV.

Vicarious Liability of a Principal for Punitive Damages for His Managerial Agent's Discrimination in Derogation of a Non-delegable Duty

Petitioners make a peculiar argument that the issue here is 'whether a husband is vicariously liable for acts of his wife.' Petitioners fail to mention Section 217C(c), *Restatement of the Law (Second) of Agency* which sets forth the liability of a principal for punitive damages for acts of his managerial agent which violate a nondelegable duty. The Court of Appeals applied this standard tenet of agency law, holding that the principal Joseph Riga is liable for punitive damages for violations of his nondelegable duty not to discriminate by acts committed by his managerial agent, Maria. The Court of Appeals found that Maria Riga's conduct displays sufficient 'malice and

reckless indifference' to support punitive damages. *App. A at 20a.*

The Third Circuit noted that the defenses to liability under Title VII enunciated in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999) do not even pertain to this case. Petitioners nevertheless claim that the Circuit's decision ' takes *Kolstad* to an unwarranted extreme..' ; Petitioners beg the Supreme Court to intervene 'before it is too late.'

Petitioners cite to *Smith v. Wade*, 461 U.S. 30, 56 (1983) and argue that Maria Riga did not display sufficient ' reckless or callous indifference' to federal rights by lying and refusing to deal with Afro-Americans on ten separate occasions for two months. In fact far less egregious conduct has supported an award of punitive damages under civil rights law. In this case, the record is replete with evidence that landlord-husband delegated his all managerial authority to his wife. She was authorized to sign his letters , deposit all checks and make all decisions dealing with rental of their six apartment buildings including decisions to repeatedly refuse to deal with Afro-Americans. Under 217C(c) *Restatement of Agency*, acts of a managerial agent in derogation of a nondelegable duty can render a principal liable. This question is not one which is necessary for this Court to review.

CONCLUSION

A panel of the Third Circuit Court of Appeals correctly held that a fair housing organization which proved diversion of its resources for investigating and countering race discrimination in housing has standing to sue for damages and redress for violations of the Fair Housing Act which its investigation revealed. The Third Circuit's conclusion does not warrant review because it correctly applied the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed. 2d. 214 (1982). The cases relied upon by Petitioners to justify grant of the writ of certiorari on grounds of conflict in the Circuits can be differentiated from the instant case based upon the particular facts of record.

Petitioners' misreading of the Third Circuit's opinion causes them to claim that the Third Circuit has enunciated a new rule on causation, when in fact the lower Court's decision is in completely in accord with years of precedent. The Court of Appeals also correctly applied precedent to hold that under the plain language of the Fair Housing Act, an award of punitive damages need not be preceded by any award of actual damages. A writ of certiorari is premature in this case, because no trial on punitive damages has been held, and the punitive damages issue may be moot after a trial.

Last, a writ of certiorari is inappropriate where the Court of Appeals, applying well-established agency principles, held that a principal with a non-delegable duty not to discriminate under the Fair Housing Act can be vicariously liable for punitive damages for acts of housing discrimination committed by his managerial agent. The petition for writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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